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A toolbox for European judges

Whose toolbox?

From the CFR to an optional instrument and a legislator's toolbox

In July 2010 the European Commission's published a Green Paper on policy options for progress towards a European Contract Law for consumers and businesses.¹ This is the latest development in a process that started almost a decade ago, with the publication by the European Commission of its first communication on European Contract Law,² to be followed in 2003 by an Action Plan in which the Commission announced the elaboration by a network of academics of a 'common frame of reference' (CFR),³ and the publication in 2009 of the academic Draft Common Frame of Reference (DCFR).⁴ The Green Paper opens a new round of consultation on the desirability, nature and scope of an 'instrument of European Contract Law'⁵ while at the same time an 'expert group' is working, for the Commission, on a draft of such an instrument.⁶ As to the legal nature of the instrument, the Commission suggests seven options: publication of the results of the expert group (option 1); an official toolbox for the legislator, consisting of either a) a Commission act on a toolbox or b) an interinstitutional agreement on a toolbox (option 2); a Commission recommendation on European contract law (option 3); a regulation setting up an optional instrument of European contract law (option 4); a directive on European contract law (option 5); a regulation establishing a European contract law (option 6); and a regulation establishing a European Civil Code (option 7). One option does not exclude the other; several of them could overlap, for example the optional instrument and the toolbox.

From the order of presentation - number 4 naturally suggests the moderate or compromise option in contrast with more extreme alternatives - and from Vice-President Reding's public interventions it is clear that the Commission's own

¹ COM(2010) 348 final, 1.7.2010.

² COM(2001) 398, 11.7.2001.

³ COM(2003) 68, 12.2.2003. See also Communication on European Contract Law and the revision of the *acquis*: the way forward, COM(2004) 651, 11.10.2004.

⁴ Ch. von Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR); Outline Edition* (Munich: Sellier, 2009).

⁵ The term 'Instrument of European Contract Law' seems to have replaced the term 'Common Frame of Reference' which is no longer used this new Green paper except to refer to the background of the current consultation or to the text of the DCFR.

⁶ See Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, 2010/233/EU, OJ 27.4.2010, L105/109, in particular art. 2 (Task). For reasons of transparency I point out that I am a member of that group.

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3 preference is for the optional instrument (OI).⁷ According to the Green paper the
4 optional instrument would be conceived as a 2nd regime in each Member State, thus
5 providing the contracting parties with an option between two regimes of domestic
6 contract law.⁸ It would insert into the national laws of the 27 Member States a
7 comprehensive and, as much as possible, self-standing set of contract law rules
8 which could be chosen by the parties as the law regulating their contracts.⁹ As the
9 Commission points out, this set of contract law rules would form part of each
10 Member State's national law also for the purposes of private international law.¹⁰ The
11 optional instrument on contract law would thus be similar to the European order
12 for payment procedure¹¹ and the European company (*Societas Europaea*),¹² although
13 the comprehensiveness and self-standing nature (in the sense that references to
14 national laws or international instruments should be reduced as much as possible)¹³
15 that the European Commission hopes for is likely to be even more problematic in
16 the case of general contract law than it has been for the European company.
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21 Whether such an optional instrument will gain enough political support is still very
22 much an open political question. The case is different for the legislator's toolbox
23 (option 2). If an optional instrument is going to be adopted it is not obvious that the
24 Commission will see a great need to take any formal measures, like adopting a
25 Commission act or negotiating an interinstitutional agreement concerning the
26 toolbox. Nevertheless, it seems natural, in such a case, that, even without any formal
27 act or agreement, the optional instrument would become an informal, but
28 potentially equally (or even more) influential, source of inspiration for the European
29 legislator. If, however, the political project of an optional instrument fails then, of
30 course, a more official toolbox is the second best alternative for the Commission and
31 other supporters of a more European contract law. And the idea of a legislator's
32 toolbox is politically hardly controversial.¹⁴ Therefore, in the three most realist
33 scenario's - i.e. an optional instrument without an official toolbox, an official
34 legislator's toolbox without an optional instrument, and an optional instrument plus
35 an official toolbox - in all likelihood the instrument will effectively become a toolbox
36 for the legislator, either formally or informally.¹⁵
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43 ⁷ See eg V. Reding, 'Making the most of the internal market: concrete EU solutions to cut red tape and
44 to boost the economy', Speech/10/42, Brussels, 24 February 2010 (press release).

45 ⁸ Green Paper, 8.

46 ⁹ Green Paper, 10.

47 ¹⁰ Green paper, footnote 25.

48 ¹¹ Regulation 1896/2006 of 12 December 2006 creating a European order for payment procedure.

49 ¹² Regulation 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

50 ¹³ See Green paper, 7.

51 ¹⁴ For example, the House of Lords considers that 'the development of a form of "toolbox" to assist
52 European legislators would be useful both to aid mutual understanding of the diverse legal systems
53 of the EU and to improve the quality of European legislation to which the law of contract is relevant.'
54 (House of Lords (European Union Committee), *European Contract Law: the Draft Common Frame of
55 Reference, Report with Evidence*, 12th Report of Session 2008–09, HL Paper 95.

56 ¹⁵ In theory, it is possible that the European legislator would adopt both an optional instrument and
57 (formally or informally) a toolbox, but would use different text versions of the common frame of
58 reference for these different functions. That could lead to considerable confusion (if not chaos) while
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A toolbox for judges?

If an instrument on European contract law (ECL-instrument) becomes a toolbox for the European legislator, either formally or informally, the question arises what this will mean for courts. Obviously, if the parties to a contract opt into an optional instrument as provided for in an EU regulation then judges will have to apply the instrument as the applicable law between the parties.¹⁶ However, what will happen outside this case of formal applicability? May or should the instrument have other, more informal roles? What place, if any, does the instrument (optional instrument or legislator's toolbox) have in the toolbox of European judges? Could or should courts, like legislators, in certain contexts be inspired by the instrument when deciding cases and, if so, when and why?

The idea that a court might wish to take the ECL-instrument as a source of inspiration, or even as a source of law, is not a fancy one. On the contrary, it seems likely that this text will be attractive (or even irresistible) in the eyes of judges especially when they are confronted with gaps or ambiguities in the law that they have to apply.¹⁷ It is a true *Fundgrube* for model rules on all sorts of subjects that might come in very handy when court need to resolve hard cases on contracts.

An optional instrument on European contract would derive formal legitimacy from the fact that it was adopted as a regulation by the European legislator following the usual procedure, through an initiative from the Commission and adoption, probably after amendments, by Council and Parliament. Issues could arise as to the legal basis, especially if the optional instrument would have a broad personal, material or territorial scope,¹⁸ but that is part of the normal order of things when European legislation is adopted. The same goes for more fundamental legitimacy issues such as the still existing democratic deficit in the European Union. More specific legitimacy issues may be raised because of the private law nature of an optional instrument: it might be argued that private law has an essence (party autonomy or commutative justice) which should be respected or that it grows organically and that a legislator can at most codify it, not design it according to its political preferences. Such arguments are general, not in the sense that they apply to all EU legislation but in the sense that they apply to all general private law legislation (in

at the same time it is not clear what would be gained from such a decision or practice, in terms of coherence or otherwise. The only exception could be where the toolbox had a broader (personal, substantive, territorial) scope. Therefore, in the following I will assume that there will be one single text playing different potential roles one of which will be, in any case, the role of a toolbox (be it formal or informal) for the European legislator.

¹⁶ There may be issues relating to internationally mandatory rules (*lois de police*) and public policy (*ordre public*) but I will leave these aside here.

¹⁷ Cf. H.-W. Micklitz, 'Failure or Ideological Preconceptions – Thoughts on Two Grand Projects: The European Constitution and the European Civil Code', EUI Working Papers LAW No. 2010/04, 9: 'The ECJ has formally no jurisdiction to refer to rules which were not taken over in the Lisbon Treaty, but it cannot be excluded that these rules may inspire the ECJ in its interpretation.'

¹⁸ Cf. M.W. Hesselink, 'An optional instrument on EU contract law: could it increase legal certainty and foster cross-border trade?', PE 425.642 (Brussels, 2010).

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3 particular, civil codes), be it European or national. Also in this sense, therefore, a an
4 optional European instrument on contract law would be business as usual.¹⁹
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7 The legislator's toolbox function also does not seem to raise particularly pressing
8 legitimacy issues. If legislators are inspired by existing texts, and even if they decide
9 to regard a text as an official toolbox, such an informal or indirect normative effect
10 of such texts is not very problematic or controversial, it seems, in all cases where the
11 final outcome is formal legislation. The reason is that legislators are free to choose
12 their own sources of inspiration and their only accountability is vis-à-vis their
13 electorate: if they make the wrong choices in the eyes of their constituents they will
14 not be re-elected.
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18 However, for judges the case may be different. An informal or indirect normative
19 effect of the ECL-instrument on adjudication seems to be prima facie more
20 problematic from a legitimacy point of view. Although today nobody believes any
21 more that judges could be merely 'les bouches qui prononcent les paroles de la loi',
22 the idea that the decisions of judges depend primarily on what they had for
23 breakfast, is not broadly accepted either. Judges are bound to apply the law.
24 Certainly, they are allowed to further develop the law as well but they are
25 constrained by the existing sources or legal materials, and by recognised methods.
26 All grand theories of adjudication, including the most sceptical ones, accept that
27 judges are constrained, at least to some extent, by law.²⁰ Moreover, judges operate
28 in a broader political context in which their actions are embedded and which pose
29 further limits as well. This raises the question of how the text of the instrument, in
30 cases where it has not been positively opted into by the contracting parties, can ever
31 become a source of inspiration that a court is allowed or even obliged to take into
32 account. How can such an informal or indirect effect of the instrument be
33 accommodated within accepted legal methods? Or, addressing the same question
34 from a different angle, what might be successful legitimisation strategies available for
35 a courts that wishes to rely on the instrument as a source of inspiration. Or, to put it
36 yet differently, is there a legitimate place for on ECL-instrument within the
37 developing European legal method?²¹ That is the central question in this paper. I
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44 ¹⁹ It has been suggested by J.M. Smits, 'European Private Law and Democracy: A Misunderstood
45 Relationship', M. Faure & F. Stephen (eds.), *Essays in the law and economics of regulation in honour of*
46 *Anthony Ogus* (Antwerp-Oxford: Intersentia, 2008), pp. 49-59, that the main source of legitimacy in
47 the case of an optional code would be party autonomy, because the code will only become applicable
48 when the parties opt for it, and that no further legitimisation is required. However, it is still the law
49 that provides the option and it does so, probably, subject to some mandatory rules. Moreover, the
50 legitimacy provided by choice may actually be weak in cases of unequal bargaining. See the criticism
51 by consumer groups, available at <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483>.

52 ²⁰ Cf D. Kennedy, *A Critique of Adjudication {fin de siècle}* (Cambridge, Massachusetts: Harvard
53 University Press, 1997), 92: '[I]f the project of legal necessity is a Golden Bowl, no one has found the
54 fatal flaw that would allow us to shatter it with a single blow. Successful critique is 'local,' even when
55 the locality is a whole theory of judicial neutrality.'" Therefore, we do not need to further explore the
56 matter here.

57 ²¹ See M.W. Hesselink, 'A European Legal Method? On European Private Law and Scientific Method',
58 15 *ELJ* 1 (2009), 20-45.
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3 will discuss three main types of legitimation: new European legal methods, classical
4 methods of interpretation, and political legitimation. The order will be from very
5 strong, specifically European, via more general 'legal', to weaker, 'merely political'
6 legitimation.²² However, before discussing these different types of legitimation we
7 will have to clarify a question relating to the scope of a European legal method.
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10 **European legal method: nationalist, dualist and Europeanist perspectives**

11 There is another dimension to the questions of whose method and whose toolbox.
12 Are we only talking about the Court of Justice of the European Union (CJEU), or also
13 about national judges when they are applying Union law, or even about national
14 judges when they are not applying Union law? For the latter, case we can distinguish
15 further between a) disputes that only partly turn on EU law, for the remaining non-
16 EU part, b) disputes that do not turn on EU law but where the EU legislator has
17 exclusive competence; c) cases that are not affected by existing EU law but where
18 the EU has a shared competence; and d) cases where the EU legislator has no
19 competence. In which cases could or should the instrument play a role as a source of
20 inspiration for judges? Should these case somehow be distinguished categorically,
21 some of them being a matter of European legal method where the ECL-instrument
22 could play a role, while others remain subject exclusively to the national legal
23 method of the forum?
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28 There are at least three different ways of looking at European private law and
29 European legal method, i.e. a nationalist, a dualist, and a Europeanist way.²³ In the
30 nationalist perception, the Europeanisation of private law is a process that affects
31 and modifies the national system of private law. In this perception, although most of
32 private law is of domestic origin an increasing part is of European extraction. The
33 focus is on how to integrate these 'foreign' elements without upsetting the original
34 system. In the Europeanist perception, in contrast, all private law in the European
35 Union forms a single, gradually integrating system. The focus is on the interplay
36 between the different levels of governance and on how the progressive coherence of
37 the whole multi-level system and the gradual convergence of its components can be
38 achieved. In this perception, an increasing part of European private law is regulated
39 on the EU level, whereas a considerable part is still regulated on the national level
40 (and a minor part on the global level) of the same system. Finally, in a dualist
41 perception, on the territory of each Member State there are two systems: a national
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47 ²² I am not suggesting that merely legal legitimacy is per se strong legitimacy but simply that, as
48 Weiler puts it, '[a]n institution, system, or polity, in most, but not all, cases, must enjoy formal
49 legitimacy to enjoy social legitimacy' (J.H.H. Weiler, *The Constitution of Europe; "Do the New Clothes
50 Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University
51 Press, 1999), p. 81).

52 ²³ See further M.W. Hesselink 'The Common Frame of Reference as a source of European private law',
53 83 *Tulane Law Review* 4 (2009), 919-971, 932-936. For a similar distinction, see J. Dickson, 'How
54 Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations Between,
55 Legal Systems in the European Union' (Univ. of Oxford Legal Research Paper Series, No. 40, 2008),
56 whose a) "Part of member states' Legal Systems" model, b) "Distinct EU legal system" model or "27
57 plus 1" model, and c) "One Big Legal System" model, are roughly similar to what I call, respectively,
58 the a) nationalist, b) dualist, and c) Europeanist perspectives.
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3 and a European one. Both systems are complementary and intertwined but
4 nevertheless distinct. In other words, each Member State has its own national
5 system of private law, in addition to which they together share a common European
6 system of European Community private law. In this perception, the focus is, quite
7 naturally, on tracing the exact borderline between the two systems.
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11 In the nationalist perception, a European toolbox on contract law will probably be
12 perceived as a potential further attack on the national legal system. The attitude
13 towards it is likely to be formal: it is not binding law so it can be ignored.²⁴ In
14 contrast, in the Europeanist perception, a common frame of reference or instrument
15 on European contract law that guides us through a process of gradual and
16 progressive convergence is exactly what we need at this moment. The strategy will
17 be to emphasise its substantive quality and the need to go beyond formal limits
18 towards the further Europeanisation of private law. Finally, the dualist will be
19 mainly concerned with the question in which cases (a-d, above) exactly the
20 European instrument could play a role.
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24 These are three perceptions of the same phenomenon, i.e. of private law in Europe,
25 neither of which can be said at the outset to be more true (positively) or more right
26 (normatively). It is impossible to discuss the issue in a neutral fashion. As I have
27 explained elsewhere, the dualist project, which is dominant in the German academic
28 debate on a European method, seems pointless because it will eventually collapse
29 into either nationalism or Europeanism.²⁵ The following account is inspired by a
30 (moderately) Europeanist approach, which means in practical terms that I will
31 include in my discussion cases where national judges could undertake a ECL-
32 instrument-friendly interpretation of national or could otherwise be inspired the
33 ECL-instrument, even beyond the scope of (potential) EU legislation.
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38 **New European legal methods**

39 **Sincere cooperation and Europe-friendly interpretation**

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41 The most far reaching role in adjudication for an ECL-instrument would exist if the
42 general EU duty of sincere cooperation would require judges always to carry the
43 instrument in their toolbox and to use it where they can. The idea would be that the
44 duty of sincere cooperation would require Europe-friendly interpretation of
45 national law, in a broad sense of favouring an ever closer Union, which in turn
46 would translate into a duty of ECL-instrument-friendly interpretation in contract
47 cases.
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51 Article 4, Para 3 of the Treaty on European Union reads as follows:
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56 ²⁴ On such formalist patterns of entrenchment, see D. Caruso, 'The missing view of the cathedral: the
57 private law paradigm of European legal integration', 3 *ELJ* (1997), 27-32.

58 ²⁵ See further Hesselink, *op cit* n 23.
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Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The obligation of harmonious interpretation, which will be discussed in the next section, is often regarded an example of the positive obligation contained in the second sentence,²⁶ but does the principle of loyal cooperation, maybe in its third sentence, also require ECL-instrument-friendly interpretation? It does not seem so. The reason is that the duty of sincere cooperation, or duty of (Community) loyalty²⁷ or 'fidelity principle' as it is sometimes called after American usage,²⁸ i.e. the constitutional equivalent of the private law duty of good faith, does not even imply any general obligation for the Member States of Europe-friendliness.²⁹ A profoundly Euro-sceptic government can be just as loyal to the Union as any other. Bogdandy speaks of a 'principle of the free pursuit of interests' which implies, among other things, that the Member States remain free to pursue their national interests in the European institutions, and which militates against the assumption of a principle of integration in favour of more Europe or more unity.³⁰ A fortiori, this means that Member States are not under a general obligation of Europe-friendly interpretation of their national law. Judges are allowed to pursue the interests of the national legal system, e.g. its internal coherence or its own underlying values. This seems to be even more strongly the case for subjects that are outside the scope of the EU competences. Moreover, the idea of 'mutual respect' (introduced by the Lisbon Treaty) could be regarded as a 'countervailing principle',³¹ which could provide a basis for legal diversity and an additional argument against a duty originating in primary EU law to interpret national private law in a Europe- or ECL-instrument-friendly way.

Some Member States require Europe-friendliness as a matter of national (constitutional) law, either as part of a more general duty of promoting the development of the international legal order³² or as a specific constitutional duty to

²⁶ See eg Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-08835 and Case C-106/89 *Marleasing v La Comercial Internacional de Alimentación* [1990] ECR I-04135 and C.W.A. Timmermans, in: P.J.G. Kapteyn et al (ed), *The Law of the European Union and the European Communities*, 4th ed. (Alphen a/d Rijn: Kluwer Law International, 2008), 149. Another explanation is the *effet utile* doctrine. See further below.

²⁷ Kapteyn & VerLoren van Themaat (Timmermans), op cit n 26, 147.

²⁸ Cf D. Halberstam, 'The Political Morality of Federal Systems' (2004) 90 *Virginia L. Rev.* 101, 104.

²⁹ See A. von Bogdandy, 'Founding Principles', in: A. von Bogdandy & J. Bast (eds), *Principles of European Constitutional Law*, 2nd ed. (Oxford: Hart Publishing, 2010), 42.

³⁰ *Ibidem*, p. 37-38.

³¹ See D. Chalmers, G. Davies & G. Monti, *European Union Law*, 2nd ed (Cambridge: CUP 2010), 223.

³² The Dutch constitution limits this task to the executive. See Article 90 Basic Law.

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3 contribute to construing the European Union. In Germany, the
4 *Bundesverfassungsgericht* (*BVerfG*) held, in its Lisbon-ruling, that a principle of
5 openness towards European law (*Europarechtsfreundlichkeit*) follows from German
6 Basic Law: ‘The constitutional mandate to realise a united Europe, which follows
7 from Article 23.1 of the Basic Law and its Preamble means in particular for the
8 German constitutional bodies that it is not left to their political discretion whether
9 or not they participate in European integration. The Basic Law calls for European
10 integration and an international peaceful order. Therefore, not only the principle of
11 openness towards international law, but also the principle of openness towards
12 European law (*Europarechtsfreundlichkeit*) applies.’³³ However, it is not clear that
13 all Member States accept, as a matter of national (constitutional law), a duty of
14 Europe-friendly interpretation. Moreover, it does not seem that in any of these
15 country, including Germany, such a duty would go much further than a (strong)
16 presumption of applicability in the Member State of EU law. And, although this will
17 differ from Member State to Member State, in most if not all countries, including
18 Germany, it would be a very long shot (indeed almost certainly too long) to derive
19 from any such national general duty of Europe-friendliness a specific duty to
20 interpret their contract law in conformity with the ECL-instrument.
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26 **Soft harmonious interpretation?**

27 National law must be interpreted in conformity with European Union law.³⁴ Could
28 this requirement of ‘harmonious interpretation’ imply a duty (sometimes) to
29 interpret national law in conformity with the instrument on European contract law?
30 Although the CJEU sometimes speaks, very broadly, of ‘the requirement for national
31 law to be interpreted in conformity with European Union law’, it is clear that this
32 requirement only exists in relation to national law within the scope of European
33 Union law.³⁵ If the optional instrument is going to be introduced, as envisaged, via a
34 regulation, then *effet utile* issues could arise, eg when national rules would
35 somehow hinder an easy opting into the instrument. However, interpretation of
36 national law in conformity with the optional-instrument-regulation would be
37 limited, it seems, to disputes between parties who (claim to) have made a choice for
38 the instrument as the applicable law to their contract. In contrast, if the ECL-
39 instrument is going to be adopted by the European legislator as a legislative toolbox,
40 then that certainly could significantly extend the potential scope of the ECL-
41 instrument and of any interpretation in conformity with it. However, crucially it is
42 very doubtful that the legislator’s toolbox, even in the case of an inter-institutional
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50 ³³ *BVerfGE* 123, 267, nr. 225. See also nr. 241. In the same sense the Mangold-follow-up decision,
51 *BVerfG*, 2 BvR 2661/06 of 6.7.2010, no. 58. Although the English term ‘openness towards European
52 law’ for the German ‘*Europarechtsfreundlichkeit*’ is the official English translation published by the
53 court itself, nevertheless ‘openness towards’ seems to be somewhat weaker and more passive (less
54 engaging) a concept than ‘friendliness’.

55 ³⁴ Settled case law. See e.g. Case C-106/89 *Marleasing v La Comercial Internacional de Alimentación*
56 [1990] ECR I-04135 and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-08835,
57 para 114.

58 ³⁵ See Case C-555/07 *Kücükdeveci* [2010] ECR I-00000, para 48.
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3 agreement to 'comply or explain',³⁶ would count as 'European Union law' in the
4 sense of the CJEU's settled case law on harmonious interpretation.
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7 Or could it be argued that the adoption of EU 'soft law', provided that it remains
8 within the scope of EU legislative competence (art. 5 TEU), implies a duty for the
9 national courts of 'soft harmonious interpretation'? For example, within the context
10 of (regular) harmonious interpretation it may happen that the directive or other EU
11 provision in question also has to be interpreted. If that directive was inspired by the
12 ECL-instrument in its capacity as a legislative toolbox, should not then the national
13 court when interpreting that directive with a view to an interpretation of its
14 national law in conformity with that directive, take the ECL-instrument into account
15 as a judicial toolbox? Clearly, any recognition of such a duty of soft harmonious
16 interpretation would only possess equally soft (i.e. relatively weak) legitimacy.
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20 General principles of EU law

21 General principles of EU law and of civil law

22 In its *Mangold* decision the Court of Justice acknowledged the existence of a
23 principle of non-discrimination on grounds of age which must be regarded as a
24 'general principle of European Union law', and which, in turn, is a specific
25 application of the general principle of equal treatment.³⁷ By reason of the principle
26 of the primacy of European Union law, which extends also to the principle of non-
27 discrimination on grounds of age, contrary national legislation which falls within the
28 scope of European Union law must be disapplied. In *Küçükdeveci* the Court made
29 clear that, unlike the directives that give expression to the principle which only have
30 indirect horizontal effect, this principle of EU law has direct horizontal effect.³⁸ This
31 case law is far from isolated. General principles of EU law play an important role in
32 the Court's jurisprudence, especially in its more creative and expansive part.
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38 In addition to the general principles of EU law the court recently also has discovered
39 general principles of civil law. In *Société thermale d'Eugénie-Les-Bains* the Court
40 cites 'the general principle of civil law' that 'each contracting party is bound to
41 honour the terms of its contract and to perform its obligations thereunder',³⁹ in
42 *Hamilton* it mentions as 'one of the general principles of civil law' the principle that
43 'full performance of a contract results, as a general rule, from discharge of the
44 mutual obligations under the contract or from termination of that contract'.⁴⁰ In
45 *Messner*, the Court invoked 'the principles of civil law, such as those of good faith or
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49 ³⁶ This has been suggested as the possible content of an inter-institutional agreement on an ECL-
50 instrument: the Commission, European Parliament and Council would commit themselves in relation
51 to all future legislation within the scope of the instrument, to comply with the instrument or explain
52 why they (propose to) deviate from it. Clearly, this would be a very far reaching commitment which
53 potentially could make the instrument hugely influential.

54 ³⁷ Case C-144/04 *Mangold* [2005] ECR I-09981, paras 74 to 76.

55 ³⁸ Case C-555/07 *Küçükdeveci* [2010] ECR I-00000, para 56.

56 ³⁹ Case C-277/05 *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de*
57 *l'Industrie* [2007] ECR I-06415, para 24.

58 ⁴⁰ Case C-412/06 *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-02383, para 42.
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3 unjust enrichment',⁴¹ and in *Asturcom* it referred to the 'basic principles of the
4 domestic judicial systems, such as protection of the rights of the defence, the
5 principle of legal certainty and the proper conduct of procedure' and to 'the
6 importance, both for the Community legal order and for the national legal systems,
7 of the principle of *res judicata*',⁴² while in *Audiolux* the Court rejected the existence
8 of a 'general principle of Community law' on the protection of minority
9 shareholders.⁴³
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13 It is not clear yet whether such principles could also have direct horizontal effect.
14 What we do know, however, is that the general principles of EU only apply when a
15 case falls within the scope of European Union law. Still, what exactly this means is
16 less clear. In *Mangold*, the case was within the scope of EU law because the
17 discriminatory national legislation was a measure implementing an EC directive
18 while in *Küçükdeveci* the national law came within the scope of EU law because the
19 equal treatment directive should already have been transposed. But if these general
20 principles are part of primary law is it really necessary for the applicability of the
21 principle that there be some *other* (secondary or other primary) EU law also
22 applicable to the case, or could it suffice that the case be within the competences of
23 the EU (following art 5 TEU)? Moreover, for these new general principles of civil law
24 it is even not clear whether they are meant to general principles of EU civil law or
25 rather general principles which the courts ascribes, as it were, to the national law
26 legal systems. And, in the former case, are they meant to be a specific subset of
27 general principles of EU, in which case they would, somewhat surprisingly - in view
28 of the not so fundamental nature of most them -,⁴⁴ obtain constitutional status as
29 primary EU law, or are they of a new kind, ie of unwritten secondary EU law?
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35 **The instrument on European contract law as general principles**

36 Our specific question here is whether the ECL-instrument could ever become a
37 source of inspiration for formulating general principles of Union law or of civil law,
38 in this sense. Strictly speaking this is not a matter of interpretation. As the Court
39 pointed out for the general principles of Union law, these principles apply as a
40 matter of the primacy of EU law.
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43 Could an ECL-instrument, be it as an optional instrument or in the form of a
44 legislator's toolbox, serve as evidence, a restatement or a codification of general
45 principle of civil law? In his Opinion in the *Hamilton* case Advocate-General Póitres
46 Maduro explicitly referred to the CFR. He pointed out that the placing of a time-limit
47 on the exercise of a right is 'a principle common to the laws of the Member States'.
48 'That principle', he continued, 'might well ultimately appear at Community level in
49 the context of the creation of a common frame of reference for European contract
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53 ⁴¹ Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-07315, para 26.

54 ⁴² Case C-40/08 *Asturcom Telecomunicaciones SL v Maria Cristina Rodríguez Nogueira* [2009] ECR I-
55 09579, paras 35 and 38.

56 ⁴³ Case C-101/08 *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others and*
57 *Bertelsmann AG and Others* [2009] ECR I-09823.

58 ⁴⁴ See below.
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3 law.⁴⁵ As a toolbox for European judges who are trying to develop European general
4 principles of civil law the instrument may certainly be convenient, especially when
5 taking into account that most judges in the CJEU do not specialise in private law.⁴⁶
6 The instrument may even prove to be irresistible.
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10 Moreover, the DCFR is the next step in a tradition in which the predecessors, i.e. the
11 Unidroit Principles of International Commercial Contracts (UP) and the Principles of
12 European Contract Law (PECL), were referred to as 'principles'.⁴⁷ The equivalent
13 rules in the DCFR are referred to as 'model rules'. The reason why the UP and the
14 PECL avoided the term 'rules' was that it seemed inappropriate for a private
15 initiative to claim to be producing legal rules. They never were meant to be
16 principles in, for example, a Dworkinian sense.⁴⁸ It is not clear, however, that the
17 Court's principles are meant to be understood as principles in a Dworkinian sense
18 either. Dworkin distinguishes between rules and principles because of their
19 dimension of weight. Many of the general principles of EU law seem to possess a
20 similar quality.⁴⁹ However, at least some the Court's general principles of civil law
21 do rather look like (but may be not entirely the same as) rules. In that case, it could
22 indeed make sense to take the instrument, which is merely the next step in the same
23 tradition after the DCFR, as a source of inspiration.⁵⁰
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28 In addition to the model rules, the DCFR, at the explicit request of the European
29 Commission,⁵¹ also contains a 'principles' section. It is an open question whether a
30 section like this will also be included in the instrument on European contract law.
31 But if it will, then at first sight this section might seem to be an obvious source of
32 inspiration for any more Dworkinian principles of civil law that the Court may wish
33 to develop. However, on further examination the principles section in the DCFR is
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39 ⁴⁵ Para 24. See also the Opinion of Advocate General Trstenjak *Messner* (C-489/07), para 94, where she
40 points out 'in passing' that the approach she advocates is similar to the one adopted by the DCFR.

41 ⁴⁶ Notable exceptions include Verica Trstenjak and Marek Safjan.

42 ⁴⁷ H. Beale & O. Lando (eds.), *Principles of European Contract Law, Parts I and II, Prepared by The*
43 *Commission on European Contract Law* (The Hague: Kluwer Law International, 2000) and *UNIDROIT*
44 *Principles of International Commercial Contracts* (Rome: Unidroit, 2004).

45 ⁴⁸ See R. Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986). See,
46 earlier, his *A Matter of Principle* (Cambridge, Massachusetts: Harvard University Press 1985).

47 ⁴⁹ In Case C-101/08 *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others and*
48 *Bertelsmann AG and Others* [2009] ECR I-09823 the Court pointed out that general principles of
49 Community law have 'the general, comprehensive character which is naturally inherent in general
50 principles of law' (para 50) and are not 'characterised by a degree of detail requiring legislation to be
51 drafted and enacted at Community level by a measure of secondary Community law' (para 63).
52 However, M. Safjan & P. Mikłaszewicz, 'Horizontal effect of the general principles of EU law in the
53 sphere of private law', 18 *ERPL* (2010), 475-486, 480, assimilate the general principles of EU law to
54 fundamental rights.

55 ⁵⁰ In the same sense J. Basedow, 'The Court of Justice and private law: vacillations, general principles
56 and the architecture of the European judiciary', 18 *ERPL* (2010) 443-474. Contrast Micklitz, *Failure*
57 *or Ideological Preconceptions*, op cit n 17, 20.

58 ⁵¹ See The way forward, loc cit n 3.
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3 rather problematic.⁵² First, because the drafters themselves changed the section
4 quite radically between two editions (within one year), which seems very odd for
5 principles of private law which are supposed to be fundamental. Secondly, because
6 what the DCFR refers to as principles actually rather seem to be values. And of
7 course there are better and more obvious sources for shared European values than
8 the DCFR, the Nice Charter and the first articles of the TEU to start with.
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12 So far, I have referred to the CJEU as the oracle of general principles of EU law and of
13 general principles of civil law. However, an interesting question is whether only the
14 CJEU is allowed to formulate them. In *Mangold* and *Kücükdeveci* the Court said that it
15 had 'acknowledged' the existence of a principle of non-discrimination on grounds of
16 age which must be regarded as a 'general principle of European Union law'. This
17 expression suggests that the principle already (may have) existed before it was
18 acknowledged by the CJEU. If this is true, could national courts also acknowledge
19 European principles, even before the CJEU has done so? As a matter of expediency
20 that might be quite risky because later on it may turn out that such a new Union
21 principle did not really exist. Therefore, it may be safer for a national court to refer
22 to the CJEU for a preliminary ruling. On the other hand, however, the Court
23 underlined in *Kücükdeveci* that national courts are not under an obligation to refer
24 to the CJEU before disapplying a national provision that is contrary to a principles of
25 EU law.⁵³ Now, *Kücükdeveci* was decided after *Mangold*. Therefore, the national
26 court could already know of the existence of the general principle. But suppose that
27 these cases had come to the court in the reverse order. The mere fact that before
28 *Mangold* the Court had not yet acknowledged its existence does not exclude that this
29 principle already existed before as a general principle of EU and that therefore a
30 national court should or could have disappplied a national provision contrary to that
31 principle, and even without reference to the CJEU. And the same would apply to
32 other principles of EU law that may be existing already today but that the court has
33 not yet had the opportunity to recognise. These are important questions concerning
34 the nature of the principles of Union law and concerning the nature of European
35 adjudication and European legal method: do EU courts merely discover or
36 'acknowledge' principles that were so far unknown or do they create new ones?
37 How much legal realism (and centralism) is there in European law? Clearly, these
38 questions are relevant also for the way in which (only centralised and top-down or
39 also decentralised and bottom-up) the contract law rules from the ECL-instrument
40 may penetrate into European contract law in the shape of general principles of
41 European Union (civil) law.
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55 ⁵² M.W. Hesselink, 'If you don't like our principles we have others. On core values and underlying
56 principles in European private law: a critical discussion of the new "Principles" section in the draft
57 CFR', in: H.W. Micklitz et al. (eds.)(Oxford: Hart Publishing, forthcoming).

58 ⁵³ See para 54.
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Traditional methods of legal interpretation

Could or should the forthcoming instrument on European contract law play a role in the context of more traditional types of legal interpretation? Such a role within acknowledged legal interpretation would legitimise some indirect normative force for the instrument. The canon of general methods of statutory interpretation in many Member States includes grammatical, historical, systematic, and teleological interpretation, although legal systems differ as to the degree to which they recognise and articulate each of these methods.⁵⁴ In addition, comparative interpretation is sometimes acknowledged as a separate method of interpretation.

Grammatical or 'literal' interpretation

Grammatical or literal or linguistic interpretation focuses on the wording and syntax of the legal provision under interpretation. It is an established method of statutory interpretation in the Member States.⁵⁵ It is also the starting point of interpretation by the CJEU.⁵⁶ This is expressed eg in the standard phrase that 'in interpreting a provision of Community law it is necessary to consider *not only* its wording but also the context in which it occurs and the objects of the rules of which it forms part'⁵⁷ and in the standard formula for harmonious interpretation where the court states that 'in applying national law, the national court called on to interpret it is required to do so, as far as possible, in the light of *the wording and* the purpose of the directive in question, in order to achieve the result pursued by the directive'.⁵⁸

In the context of such 'literal' interpretation the instrument could play a role when courts are trying to determine the meaning of certain terms used in EU legislation. So far, the CJEU seems to be reluctant to transpose the meaning of a term used in one piece of European legislation into another. For example, in the *Simone Leitner* case the Court refused to borrow the definition of 'damage' from the product liability directive for determining the meaning of the same concept in the package travel directive, in spite of the suggestion by its Advocate-General Tizzano to do

⁵⁴ For Germany, see explicitly *BVerfGE* 11, 126, 130 (17 May 1960). Similar, art. 3, para 1 of the Spanish *Código Civil*.

⁵⁵ For Germany, see eg K. Larenz & C.-W. Canaris, *Methodenlehre der Rechtswissenschaft*, 3rd ed. (Berlin etc: Springer, 1995), 141; for France, see M. Fabre-Magnan, *Introduction générale au droit; Cours et méthodologie* (Paris: PUF, 2009), 49 (*méthode exégétique*); for England, see J. Cartwright, *Contract Law; An Introduction to the English Law of Contract for the Civil Lawyer* (Oxford: Hart Publishing, 2007), 25 (golden rule); for Belgium, see *Dekkers-Wylleman Handboek Burgerlijk Recht*, Vol. I (Antwerp-Oxford: Intersentia, 2009), no. 37 (E. Dirix); for Spain, see L. Díez-Picazo & A. Gullón, *Sistema de Derecho Civil*, Vol. I (10th ed.) (Madrid: Tecnos, 2010), 166; for Austria, see *Koziol-Welser Bürgerliches Recht*, Vol I (H. Koziol), 11th ed. (Vienna: Manz 2000), 21, for Italy, see G. Alpa, *Manuale di diritto privato*, 4th ed. (Milano: Cedam, 2005), 116; for CISG, see S. Eiselen, 'Literal interpretation: the meaning of the words', in: A. Janssen & O. Meyer (eds.), *CISG Methodology* (Munich: Sellier, 2009), 61-89.

⁵⁶ See eg M. Pechstein & C. Drechsler, 'Die Auslegung und Fortbildung des Primärrechts', in: K. Riesenhuber (ed.), *Europäische Methodenlehre; Handbuch für Ausbildung und Praxis* (Berlin: De Gruyter Recht, 2006), § 8, 18.

⁵⁷ See eg Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923 and Case C-156/98 *Germany v Commission* [2000] ECR I-06857, para 50 (emphasis added).

⁵⁸ Case C-555/07 *Küçükdeveci* [2010] ECR I-00000, para 48.

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3 so.⁵⁹ For that reason, it seems unlikely that the court would use the instrument as a
4 source of inspiration for finding autonomous *general* European definitions of legal
5 concepts. On the other hand, however, that was exactly one of the main reasons
6 given by the European Commission in its 2003 Action Plan, and with specific
7 reference to the example of the *Leitner* case, for introducing the idea a common
8 frame of reference.⁶⁰ Moreover, at the explicit request of the Commission the DCFR,
9 as it was published in 2009, consists of principles, model rules, and *definitions*.
10 Indeed, there is a whole part of the book (called Annex) dedicated entirely to
11 definitions of legal concepts. Especially, in the case of an official legislator's toolbox
12 based on a 'comply-or-explain' interinstitutional agreement (see above), courts may
13 assume, with some reason, that the meaning of a term contained in EU legislation in
14 the area of private law after the adoption of the instrument is the one formulated in
15 the instrument.
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20 Historical interpretation

21 Historical interpretation focuses on the legislative history of the provision and pays
22 particular attention to the *travaux préparatoires*. This is a well established method
23 of interpretation in many Member States especially in relation to more recent
24 legislation.⁶¹ However, it is only rarely used by the Court of Justice.⁶²
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28 Could the instrument on European contract law come into play in the context of
29 historical interpretation? Obviously, that would much rather be the case in its
30 legislator's toolbox capacity than if it was only adopted as an optional instrument. In
31 the case of a Commission decision or an inter-institutional agreement to use the
32 instrument as a reference tool for improving the coherence and the quality of EU
33 legislation,⁶³ a court applying that legislation may be interested in looking behind
34 the text of the EU legislation to see where it came from. This could especially be the
35 case if the Commission proposal or the Council and European Parliament materials
36 explicitly referred to the toolbox, be it to the black letter text of the model rules, or
37 even to the official comments belonging to the instrument.
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43 ⁵⁹ Opinion of Advocate General Tizzano in Case C-168/00 (*Simone Leitner v TUI Deutschland GmbH*
44 *Co. KG*) of 20 September 2002, paras 29 to 33.

45 ⁶⁰ Action Plan, loc cit n 3, 62.

46 ⁶¹ See for Germany, Larenz & Canaris, *Methodenlehre*, op cit n 55, 149; for France, Fabre-Magnan,
47 *Introduction générale*, op cit n 55, 49; for Belgium, *Dekkers-Wylleman* (Dirix), op cit n 55, 37; for
48 Spain, Díez-Picazo & Gullón, *Sistema*, op cit n 55, 168; for Austria, *Koziol-Welser* (Koziol), op cit n 55,
49 23, for Italy, Alpa, *Manuale*, op cit n 55, 117; for the Netherlands, *Asser-Vranken*** (Zwolle: Tjeenk
50 Willink, 1995), 14 ; for CISG, see U. Gruber, 'Legislative Intention and the CISG' in: A. Janssen & O.
51 Meyer (eds.), *CISG Methodology* (Munich: Sellier, 2009), 91-111.

52 ⁶² See eg M. Pechstein & C. Drechsler, 'Die Auslegung und Fortbildung des Primärrechts', in: K.
53 Riesenhuber (ed.), *Europäische Methodenlehre; Handbuch für Ausbildung und Praxis* (Berlin: De
54 Gruyter Recht, 2006), § 8, nr. 32. In Case C-478/99, *Commission v Sweden*, Para. 23, the Court took
55 into account the fact that 'according to a legal tradition that is well established in Sweden and
56 common to the Nordic countries, preparatory work constitutes an important aid to interpreting
57 legislation', but that, of course, only meant the acknowledgment of a tradition in the Nordic countries.

58 ⁶³ See Green Paper, 9.
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This may be particularly relevant in the context of harmonious interpretation, both when it is clear that the national legislator has not properly transposed a directive and when determining *whether* the national legislator has properly fulfilled its implementation duty. However, on the other hand, in the context of harmonious interpretation, teleological interpretation is both more recurrent and also the more obvious method.

The national legislator, without being bound to do so, could also spontaneously decide to be inspired by the legislator's toolbox or even by the optional instrument, as a model. Such a model role is explicitly envisaged by the European Commission.⁶⁴ In such cases, a national court when interpreting autochthonous national law similarly may also wish to 'look behind' the text of national law in order to see what exactly it was in the instrument on European contract law that inspired the national legislator.

Systematic interpretation

Another conventional interpretation method is systematic interpretation. This means that courts construe a certain legal rule, not in isolation, but in the light of the broader set of rules (contained in the same article, section, statute or code) that it is part of or otherwise coheres with.⁶⁵ The systematic interpretation method also plays a considerable role in the decisions of the CJEU,⁶⁶ eg when the Court holds that something 'follows from the general scheme of the Community rules' ('ergibt sich aus der allgemeinen Systematik der Gemeinschaftsregelung', 'résulte de l' économie générale de la réglementation communautaire').⁶⁷ However, the limit seems to lie in the *effet utile* doctrine which follows from the purposive nature of the European Union and its legislation.⁶⁸

Could the instrument on European contract law play any role in the context of systematic interpretation? The European Commission's Action Plan presented the CFR as a tool for making European contract law more coherent.⁶⁹ And the Commission's Green paper envisages the toolbox as an instrument for ensuring the coherence of legislation.⁷⁰ If the aim of the instrument is indeed to make the *acquis*

⁶⁴ Green Paper, p. 4.

⁶⁵ See for Germany, Larenz & Canaris, *Methodenlehre*, op cit n 55, 145; for France, Fabre-Magnan, *Introduction générale*, op cit n 55, 49; for the Netherlands, *Asser-Vranken***, op cit n 61, 118; for Spain, Díez-Picazo & Gullón, *Sistema*, op cit n 55, 167; for Austria, *Koziol-Welser* (Koziol), op cit n 55, 22; for Italy, Alpa, *Manuale*, op cit n 55, 116; for the CISG, U. Magnus, 'Tracing methodology in the CISG: dogmatic foundations', 33-59, in: A. Janssen & O. Meyer (eds.), *CISG Methodology* (Munich: Sellier, 2009), 48.

⁶⁶ See Pechstein & Drechsler, *Auslegung*, op cit n 56, 23-27.

⁶⁷ See eg Case C-389/93 *Anton Duerbeck GmbH v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-01509, para 28. As a recent example, see Joined Cases C-261/07 and C-299/07 *VTB-VAB* [2009] ECR I-02949, para 58.

⁶⁸ *Ibidem*.

⁶⁹ See the title of the plan: 'A More Coherent European Contract Law, an Action Plan', loc cit n 3.

⁷⁰ See Green Paper, 8: 'Commission act on a "toolbox": Drawing on the results of the Expert Group, the Commission could adopt an act (e.g. a Communication or Commission Decision) on European

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4 more coherent and if the European legislator (either the Commission alone, through
5 a decision, or together with the Council and the Parliament, in an inter-institutional
6 agreement) adopts the instrument as an official toolbox and actually uses it as a tool
7 for making the *acquis* become more coherent, then it could make sense for an
8 interpreter of European legislation in the area of contract law to take the instrument
9 into account as well, even beyond the text of the *acquis*, when conducting a
10 systematic interpretation.⁷¹ Indeed, to the extent that 'the general scheme' of the EU
11 rules in the area contract law is increasingly determined by the instrument on
12 European contract law a systematic interpretation would be more naturally inspired
13 by the system of the instrument. This would also be in line with a view according to
14 which the instrument could play a pivotal role in a developing multi-level system of
15 European private law.⁷²
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18 19 Teleological interpretation

20 Teleological or purposive interpretation means interpretation in accordance with
21 the rationale of the provision (*ratio legis*) or the policy aim underlying the rule.
22 Although this is also a well established method of interpretation in the Member
23 States,⁷³ it is not traditionally used there very often in relation to general private
24 law. The reason is that private law is not usually regarded as having any specific
25 purposes other than the fair and just resolution of disputes between private parties.
26 However, this is clearly different for the more recent specific parts of private law,
27 such as labour contract law, landlord and tenant law, and consumer law which all
28 have a specific aim, i.e. the protection of weaker parties.
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32 The situation is very different for EU law, including EU private law. Because of the
33 functional and instrumental nature of the EU, and of its primary and secondary
34 legislation, teleological interpretation plays a prominent role in the practice of the
35 CJEU. The competences of the Union are governed by the principle of conferral (art.
36 5 (1) TEU). And these competences are conferred upon the Union with a view to
37 achieving certain aims.⁷⁴ Although the European Union has not only an economic
38 but also a social purpose,⁷⁵ the most relevant legislative objective in the area of
39 private law has been the construction and proper functioning of the internal market.
40 Most of the contract law *acquis* was adopted on the basis of what is now Article 114
41 TFEU (ex 95 EC). Pursuant to the first paragraph of that provision the European
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45 Contract Law to be used as a reference tool by the Commission to ensure the coherence and quality
46 of legislation.'

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48 ⁷¹ This reasoning could be regarded as a specific application of the idea of determining the intention
49 of the historical legislator (historical interpretation).

50 ⁷² See Hesselink, op cit n 23, 932. On European private law as a developing multi-level system see C.
51 Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True
52 Conflicts and a New Constitutional Perspective', *European Law Journal* (1997), 378.

53 ⁷³ See for Germany, Larenz & Canaris, *Methodenlehre*, op cit n 55, 153; for Spain, Díez-Picazo &
54 Gullón, *Sistema*, op cit n 55, 170; for Austria *Koziol-Welser* (Koziol), op cit n 55, 25; for Italy, Alpa,
55 *Manuale*, 116.

56 ⁷⁴ See art. 5, para 2 TEU.

57 ⁷⁵ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR
58 I-11767, para 105.
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3 Parliament and the Council can adopt approximation measures which 'have as their
4 *object* the establishment and functioning of the internal market'. For legislation
5 whose legitimacy is so closely linked to a specifically defined *telos* it is only natural
6 that courts should resort to a teleological method of interpretation. Indeed, as we
7 saw, the CJEU underlines in its judgments that in interpreting a provision of EU law
8 'it is necessary to consider not only its wording but also the context in which it
9 occurs and the *objects* of the rules of which it forms part'.⁷⁶
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13 What role could an instrument on European contract law play in the context of
14 teleological interpretation? Directives in the area of private law have as their stated
15 purpose 'the approximation of laws concerning [a certain specific subject]',⁷⁷ or,
16 since *Tobacco*,⁷⁸ 'to contribute to the proper functioning of the internal market and
17 achieve a high level of consumer protection by approximating laws on' a given
18 subject.⁷⁹ They aim to do so by instructing the Member States to introduce into their
19 national laws rules, which are usually rather detailed, concerning the rights and
20 obligations of private parties in relation to certain aspects of certain types of
21 contractual relationships. However, when a doubt arises as to how exactly the
22 Member States are to modify their laws (i.e. when a directive seems to contain an
23 ambiguity or a gap) the stated purpose of approximating laws is of little assistance
24 because, clearly, *any* interpretation which is given by the CJEU and followed by the
25 Member States will lead to the approximation of laws. The problem is that the aim of
26 approximating laws says nothing about the content of these laws. It says nothing,
27 that is, about the rights and obligations that the parties to certain contracts should
28 have in certain circumstances. The notion of a high level of consumer protection
29 provides more substantive guidance because it has a meaning not merely as a public
30 aim but also in relation to the horizontal, private law question of what the rights and
31 duties of the parties should be. However, it is also not itself conclusive since the aim
32 of a high level of protection does not in itself imply any aspiration to maximise
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39 ⁷⁶ Loc cit n 57. (emphasis added).

40 ⁷⁷ See art. 1, Directive 90/314/EEC (on package travel, package holidays and package tours); Art. 1,
41 Directive 93/13/EEC (on unfair terms in consumer contracts); art. 1, Directive 94/47/EC (on the
42 protection of purchasers in respect of certain aspects of contracts relating to purchase of the right to
43 use immovable properties on a timeshare basis); art. 1, Directive 97/7/EC (on the protection of
44 consumers in respect of distance contracts); and art. 1, para 1, Directive 1999/44/EC (on certain
45 aspects of the sale of consumer goods and associated guarantees).

46 ⁷⁸ Case C-376/98 *Germany v European Parliament and Council of the European Union* [2000] ECR I-
47 08419 (*Tobacco*), para 84). As it is well known, in that case the Court underlined that a measure
48 adopted on the basis of art 114 TFEU (then 100a EC) must genuinely have as its object the
49 improvement of the conditions for the establishment and functioning of the internal market and that
50 a mere finding of disparities between national rules is insufficient to justify art 114 TFEU as a legal
51 basis. However, according to S. Weatherill, 'An ever tighter grip: the European Court's pro-consumer
52 interpretation of the EC's directives affecting contract law' in: M. Andenas et al (eds), *Liber amicorum*
53 *Guido Alpa: Private law beyond the national systems* (London: British Institute of International and
54 Comparative Law, 2007), 1037-1055, 1042 '*Tobacco Advertising* increasingly looks like a highly
55 atypical ruling'.

56 ⁷⁹ See art. 1, Directive 2005/29/EC, (Unfair Commercial Practices Directive); art. 1, Proposal for a
57 Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final,
58 8.10.2008.
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consumer protection. Therefore, a rule of thumb to the effect that in case of doubt about the meaning of a directive, the interpretation most favourable to the consumer shall prevail (in analogy to the duty to interpret preformulated contract clauses in a pro consumer fashion)⁸⁰ cannot be derived from art 12 TFEU.

This lack of normative guidance is an inevitable consequence of the incongruence between the public and vertical nature and aims of directives, on the one hand, and their private law content, on the other. Indirect horizontal effect has changed this in the sense that individuals are now entitled to an interpretation of Member State law that is as much in conformity with EU directives as possible. If the directive clearly states that a private party should have a certain right or obligation then to the extent that national law allows this (ie no contra legem) the private party is entitled to that private law right. But when it is unclear what rights or obligations the directive requires the Member States to assure their citizens, ie when it comes to the interpretation of the directive itself, we are back at the same question: if the directives contains gaps or ambiguities in relation to what the rights and obligations of private parties should be, of what assistance are the stated aims of approximation of laws, improvement of the internal market and (to a certain extent) a high level of consumer protection going to be?

In recent years the CJEU has had to decide, among other things, whether a court must assess of its own motion whether a jurisdiction or arbitration clause is unfair;⁸¹ whether a technical problem in an aircraft which leads to the cancellation or delay of a flight is covered by the concept of 'extraordinary circumstances';⁸² whether in the case of withdrawal by a consumer from a distance contract a seller may claim compensation for the value of the use of the consumer goods by the consumer;⁸³ whether a seller who has sold consumer goods which are not in conformity with the contract may require the consumer to pay compensation for the use of the defective goods until their replacement with new goods;⁸⁴ whether a right of cancellation may be exercised no later than one month from the time at which the contracting parties have performed in full their obligations under a contract for long-term credit;⁸⁵ whether a payment by bank transfer may avoid or put an end to the application of interest for late payment only when that the sum due is credited to the account of the creditor within the period for payment;⁸⁶ whether the effect of cancellation of a loan agreement can be limited to the avoidance of that agreement,

⁸⁰ See art 5, Directive 93/13/EEC on unfair terms in consumer contracts.

⁸¹ Case C-137/08 *VB Pénzugyi Lízing Zrt. v Ferenc Schneider* [2010] ECR I-00000, Case C-40/08 *Asturcom Telecomunicaciones SL v Christina Rodriguez Nogueira* [2009] ECR I-00000, Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Gyórfi* [2009] ECR I-04713, Case C-168/05 *Elisa Maria Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero and Others* [2000] ECR I-04941.

⁸² Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923.

⁸³ Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-07315.

⁸⁴ Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-02685.

⁸⁵ Case C-412/06 *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-02383.

⁸⁶ Case C-306/06 *01051 Telecom GmbH v Deutsche Telekom AG* [2008] ECR I-01923.

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4 even in the case of investment schemes in which the loan would not have been
5 granted at all without the acquisition of the immovable property;⁸⁷ and whether
6 consumers, in principle, have a right to compensation for non-material damage
7 resulting from the non-performance or improper performance of the services
8 constituting a package holiday.⁸⁸ It seems difficult, and indeed artificial, to answer
9 such questions having in mind only the purposes of the approximation of laws, the
10 improvement of the internal market, and a high level of consumer protection,
11 without asking oneself what might be a just and fair solution between typical parties
12 to a contract of the kind at hand. How can one properly deal with such questions
13 without invoking any contract law reasoning? It seems, therefore, that sooner or
14 later the EU will have to develop its own general rules or principles of private law.⁸⁹
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18 It is in this context that the instrument could play an important (maybe its most
19 important role). It could provide some guidance, some prima facie answers to the
20 question what amounts to a high level of consumer protection and to more specific
21 private law questions. Strictly speaking this would not be a case of teleological
22 interpretation. Rather, it would be a solution for the mismatch between the vertical
23 nature of directives with their public law aims, on the one hand, and the private law
24 nature of the content of directives that deal with the rights and duties of private
25 parties. In the absence of a European model or frame of reference the interpreters of
26 directives that aim at the harmonisation of private law simply remain without any
27 substantive guidance in relation to the private law questions that come up when
28 national courts perceive ambiguities and gaps in directives.
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32 Comparative interpretation

33 In the case of comparative interpretation a court consults and compares solutions
34 reached in other legal systems to the problem at hand. In the Member States this
35 interpretation method is much more recent, much less generally accepted and much
36 less widely used than the four more canonical methods discussed so far.⁹⁰
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39 Comparative interpretation is problematic in a number of ways, both theoretical
40 and practical. The main theoretical difficulty is the methodological shift from the
41 positive to the normative. How can any comparison of differences and similarities
42 between a given number of legal systems ever per se contribute to interpreting
43 rules of law? What does the state of the law in other countries tell me about what
44 the law is in my own country? And once we know that legal systems differ or are
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47 ⁸⁷ Case C-350/03 *Elisabeth Schulte and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG* [2005]
48 ECR I-09215.

49 ⁸⁸ Case C-168/00 *Simone Leitner v TUI Deutschland GmbH Co. KG* [2002] ECR I-02631.

50 ⁸⁹ And the CJEU has started to do so. See above. In the same sense Weatherill, *An ever tighter grip*, op
51 cit n 78.

52 ⁹⁰ In Germany, it is used by the German *Bundesverfassungsgericht* and *Bundesgerichtshof*, albeit only
53 rarely. See S. Vogenauer *Die Auslegung von Gesetzen in England und auf dem Kontinent*, Vol. I
54 (Tübingen: Mohr Siebeck, 2001), 43, who discusses comparative interpretation as a specific instance
55 of systematic interpretation. For the Netherlands, see *Asser-Vranken***, 198. English judges regularly
56 compare with other common law jurisdictions overseas. For a famous example of judicial comparison
57 with civil law systems, see *White v Jones* [1995] 2 WLR 187 (per Lord Goff).
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3 similar what does that tell us about what is the better, more appropriate or
4 otherwise preferred solution, without recourse to any additional normative
5 criterion? The functional method of legal comparison has been suggested as a way
6 out of this problem. Zweigert & Kötz have famously argued that the basic
7 methodological principle of all comparative law is that of functionality. As they
8 argue, this proposition 'rests on what every comparatist learns, namely that the
9 legal system of every society faces essentially the same problems, and solves these
10 problems by quite different means though very often with similar results.'⁹¹ Clearly,
11 if indeed we can compare legal rules and doctrines in terms of their functions, in
12 particular their problem solving function, then the observation that one system
13 performs that function better than another system is hardly problematic. Thus, the
14 problem seems to have evaporated. However, that impression is clearly based on an
15 illusion. In functional legal comparison the normative question is only hidden.
16 Everything depends on the function that is ascribed to a legal rule or doctrine. But is
17 law, in particular private law, really best described (exclusively) in functional terms
18 (as philosophical pragmatists have argued) or is it rather something that developed
19 historically and is culturally imbedded?⁹² And even if legal rules are best understood
20 in terms of their function who decides what the functions of our rules are? A rule
21 may work perfectly well for one person or group but may be much less functional in
22 the eyes of others who also are affected by it. In other words, functionalism does not
23 solve the problem, it just postpones the question. Other types of normative legal
24 comparison, eg counting the number of countries that have adopted a certain
25 solution, seem to be even more problematic, indeed arbitrary.

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32 The methodological difficulties in relation to normative legal comparison became
33 especially clear in relation to the PECL and the DCFR. And that makes them relevant
34 for the instrument on European contract law as well since the instrument will be
35 based on the DCFR.⁹³ Both the PECL and the DCFR are claimed by their authors to be
36 based on legal comparison.⁹⁴ However, the comparative basis of each has been
37 severely challenged.⁹⁵ Of course, the use of the instrument as a toolbox can still be
38 legitimised in other ways (eg simply because they are the 'best solutions' by some
39 standard),⁹⁶ but that would then be a different, direct legitimation, not via

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44 ⁹¹ K. Zweigert en H. Kötz, *Introduction to Comparative Law*, 3rd ed (Oxford: OUP, 1998), pp. 34.

45 ⁹² For the critique of functionalism, see especially G. Frankenberg, 'Critical Comparisons: Re-thinking
46 Comparative Law', *Harvard International Law Journal* 26 (1985), 411 and P. Legrand, *Que sais-je? Le*
47 *droit comparé* (Paris: PUF, 1999).

48 ⁹³ Art. 2, Commission Decision of 26 April 2010 Setting up the Expert Group on a Common Frame of
49 Reference in the area of European contract law (2010/233/EU) *OJ* 27.4.2010, L105/109.

50 ⁹⁴ See PECL, Introduction, xxvi; DCFR, Introduction, 63.

51 ⁹⁵ For the DCFR see, in particular, N. Jansen, 'The authority of the Academic "Draft Common Frame of
52 Reference"', H.-W. Micklitz & F. Cafaggi (eds.), *European private law after the Common Frame of*
53 *Reference* (Cheltenham, UK: Edward Elgar, 2010), 147-172, 162. As to the PECL, the authors
54 themselves acknowledge that '[s]ome of the provisions in the Principles reflect suggestions and ideas
55 which have not yet materialised in the law of any State.' (Introduction, p. xxvi)

56 ⁹⁶ Cf. H.-W. Micklitz, 'Review of academic approaches to the European contract law codification
57 project', in: M. Andenas et al (eds), *Liber amicorum Guido Alpa: Private law beyond the national*
58 *systems* (London: British Institute of International and Comparative Law, 2007), 699-728, 726.

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3 comparative interpretation. Political legitimation will be discussed in the next
4 section.
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7 It is probably for the same reasons that in the national context the normative force
8 of legal comparison is also not regarded as very strong. In the Netherlands, for
9 example, Vranken, although considering comparative interpretation as one of the
10 tools in the 'toolbox' (!) of a judge, immediately adds that its normative force is
11 rather weak; at most it has 'persuasive authority'.⁹⁷ On the other hand, however, it
12 has been pointed out that legal comparison may have a 'subversive effect'.⁹⁸ If all
13 other Member States have adopted a rule or solution which is different from our
14 own should we not reconsider ours? This kind of reasoning may contribute, in spite
15 of anti-functionalist critique, to legitimising comparative interpretation - or rather
16 to comparative adjudication, which is a broader concept. As Ralf Michaels puts it,
17 functional comparison 'emphasises differences within similarity'.⁹⁹ In this context
18 clearly any common core research could play an important role. And within that
19 context the instrument on European contract law, as a purported statement of the
20 common core, with comparative notes in the DCFR which could support this, may be
21 tempting. This role for the instrument is not exactly the same as the one via Europe-
22 friendly interpretation discussed above. In practice there will be a strong overlap
23 but the reasoning and the legitimation are somewhat different: here the argument is
24 not so much 'more Europe' or 'an ever closer Union' or 'a level playing field'. The
25 assumption is rather that one country could learn from the (collective) experience
26 of others.¹⁰⁰
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33 Political legitimation

34 In addition to the new legal methods developed specifically in relation to EU law and
35 the more traditional methods that have long belonged to the canons of
36 interpretation in the Member States, but also applied today in relation to EU law,
37 including European contract law, there is a third possible kind of legitimation of the
38 use made by European courts of an instrument on European contract law as a
39 source of inspiration, i.e. 'merely' political legitimation.
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43 When such policy or political arguments can and should come in, is a vexed
44 question. And this is certainly not the place to go deeply into these matters, let alone
45 to propose a novel theory. Suffice is to say that today it is quite broadly accepted
46 that courts do more than merely interpret existing law. They also further develop it
47 and create new rules. There is difference of opinion as to whether, even in hard
48 cases, the law ever 'runs out' in the sense that judges then have discretion or that
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53 ⁹⁷ Asser-Vranken**, 205.

54 ⁹⁸ G.P. Fletcher, 'Comparative Law as a Subversive Discipline', 46 *AJCL* (1998), p. 683 ff; H. Muir Watt,
55 'La fonction subversive du droit comparé', *RIDC* 3-2000, p. 503 ff.

56 ⁹⁹ Ralf Michaels, 'The functional method of comparative law', in: M. Reimann & R. Zimmermann
57 (eds.), *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2006), ch 10.

58 ¹⁰⁰ See M.W. Hesselink, *The new European legal culture* (Deventer: Kluwer, 2001), 51.
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3 instead - from within: the internal perspective - there is always a right answer to
4 every legal question (even though an external sceptic may point to all sorts of
5 factors that actually strongly influence adjudication). However, it is generally
6 acknowledged, also in Dworkin's right answer thesis, that finding the right answer is
7 not merely a matter of 'fit' with the available legal materials but also of 'justification'
8 in terms of political morality.¹⁰¹
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12 So, what kind of policy considerations could justify the use of the instrument as a
13 toolbox for judges? I will, discuss four possible types of justification: the
14 endorsement by other political institutions, the substantive quality of the
15 instrument, the prestige of its authors, good governance, and political philosophy.
16 These are all instances of 'non legal' and 'merely political' legitimacy in the sense
17 that they do not justify the use by the courts of the instrument because it somehow
18 already is the law or because it can contribute to figuring out what already is the law
19 but rather because it should become the law in the (more or less strong) sense that
20 it should obtain some legal authority.
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23 **Political endorsement**

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25 Judges may want to rely on the instrument on European contract law because it
26 enjoys strong political support. The DCFR has been drafted at the request of the
27 Commission, with the backing of Parliament and Council and the instrument itself is
28 currently being drafted for the Commission. As said, what steps exactly will follow
29 the Green Paper consultation is still uncertain but in any case there is broad political
30 support for a legislator's toolbox function.¹⁰² In spite of the separation of powers,
31 according to which judges only have to apply the laws that the legislator has actually
32 enacted, this political fact is likely to count for European judges.
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36 Moreover, it is important to point out here that there is a difference, in this respect,
37 (at least of degree) between criminal and administrative law, on the one hand, and
38 much of private law on the other hand. Most of contract law and most of the rules in
39 the DCFR can be set aside by the parties in their contract because they are only non-
40 mandatory (or 'default') rules. In other words, rules of private law, although
41 formally enacted as law, in principle are only binding on private parties when they
42 want them to. Indeed, the notion of the rule of law in the sense of a government of
43 laws and not of men (John Adams) or that no one is above the law (A.V. Dicey) does
44 not apply to most of contract law because the parties are actually above the main
45 part of contract law.¹⁰³
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49 Having said that, there are different theories on the nature of non-mandatory rules.
50 Legal economists tend to regard them as the 'hypothetical bargain', ie what typical
51 contracting parties would have agreed but is now provided by the legislator in order
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54 ¹⁰¹ Dworkin, *Law's Empire*, op cit n 48.

55 ¹⁰² This is, of course, general support for the instrument as whole, not for any specific rules contained
56 in it.

57 ¹⁰³ But 'non-mandatory' rules often are de facto binding. See M.W. Hesselink, 'Non-Mandatory Rules
58 in European Contract Law', 1 *ERCL* 2005, 43-84.
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3 to help them save transaction costs. However, in most European countries the idea
4 is rather that non-mandatory rules have what the Germans call a 'Leitbildfunktion',
5 i.e. they enshrine the legislator's view on what would be a fair and just solution. This
6 idea plays a role, for example, in the context of the determining the unfairness of
7 contract terms. Whether a term is unfair depends, in part, on how much it deviates
8 from the otherwise applicable (non-mandatory) rules.¹⁰⁴ This idea seems to have
9 been implicitly accepted by the CJEU in *Freiburger Kommunalbauten* when it held
10 that in determining whether a particular term in a contract is unfair the
11 consequences of the term under the law applicable to the contract must also be
12 taken into account.¹⁰⁵
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17 If the instrument is going to be adopted by the European Commission, the Council of
18 the European Union and the European Parliament as a 'legislator's toolbox' will that
19 be very different from a legislator's model (*Leitbild*) for just and fair solutions that
20 the judge, for that reason alone, may want to follow? Therefore, especially for the
21 non-mandatory rules in the instrument (i.e. the bulk of them) the line between a
22 non-mandatory rule in actually enacted European legislation and the same rule
23 contained legislator's toolbox which has become the object of a 'comply or explain'
24 inter-institutional agreement, is rather thin. This shows how hybrid the nature of
25 the instrument will be. In different formal roles it is likely to give different degrees
26 of formal effect to rules that do not change in substance. In such a context, a not so
27 formalist judge is likely to take into account that, one way or the other, there is
28 broad political support from the main political institutions for this particular set of
29 rules.
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33 Substantive quality

34 The instrument could obtain authority because of its substantive quality, i.e. simply
35 because it contains rational solutions and quite apart from whether it would also be
36 the binding law between the parties who have opted for it (optional instrument) or
37 that it played a role in legislation (legislator's toolbox), or indeed that it may have
38 played role (in other cases) within the context of one of the acknowledged methods
39 of interpretation (see the previous two sections).¹⁰⁶ For example, in cases where a
40 judge finds herself confronted with (what she regards as) a gap in the law.
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44 A number of German scholars have argued that the Principles of European Contract
45 Law today already enjoy such substantive authority.¹⁰⁷ However, some of the same
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49 ¹⁰⁴ See § 307 BGB, para 2.

50 ¹⁰⁵ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter*
51 *and Ulrike Hofstetter* [2004] ECR I-03043, para 21.

52 ¹⁰⁶ Admittedly, this abstraction, although conceivable in theory, is somewhat hard to imagine in
53 practice.

54 ¹⁰⁷ See C.-W. Canaris, 'Die Stellung der "UNIDROIT Principles" und der "Principles of European
55 Contract Law" im System der Rechtsquellen', in: Jürgen Basedow (ed), *Europäische*
56 *Vertragsrechtsvereinheitlichung und deutsches Recht* (Tübingen: Mohr Siebeck 2000), 5-32, 28
57 ('Rechtsgewinnungsquelle'); Jansen, *The authority of the academic 'DCFR'*, op cit n 95; H. Eidenmüller,
58 F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, 'The Common Frame of Reference
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3 authors are also argue, quite categorically, that the DCFR is not of enough quality for
4 obtaining a similar authority.¹⁰⁸ This is somewhat surprising since the core of the
5 DCFR, ie general contract, is strongly based on the PECL. Indeed, others have
6 expressed a different view. For example, Lord Mance regards the DCFR as ‘a
7 wonderful piece of work’.¹⁰⁹ The explanation for the difference of opinion may lie in
8 the fact that the German professors adopted ‘academic quality’ as their criterion.¹¹⁰
9 In any case, the implication seems to be that, to the extent that the transformation of
10 the DCFR into an instrument on European contract will bring a return to PECL (or to
11 the Unidroit principles to which the same German scholars also attribute authority),
12 as has been advocated,¹¹¹ the instrument could obtain substantive authority.
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17 A similar, but somewhat different, possible reason for courts to rely on the
18 instrument might be that it contains ‘best solutions’. It was the Commission’s
19 explicit aim that the DCFR should contain best solutions¹¹² and be of high quality.¹¹³
20 It is also what the drafters of both the PECL and the DCFR have claimed for their
21 texts: insofar as they are not based on legal comparison they purport to contain ‘the
22 best’ or, more modestly, ‘suitable’ solutions.¹¹⁴ This claim brings the legitimation
23 close to functionalism in comparative law, that was discussed above in relation to
24 comparative interpretation. And, of course, the same criticisms apply here as well:
25 best solutions to what problem (and whose problem)? And who decides what the
26 problems are? Both the concepts of ‘legal quality’ and ‘best solutions’ are clearly
27 problematic.¹¹⁵ Except for contemporary believers in the law of reason
28 (*Vernunftrecht*)¹¹⁶ they require further evaluative criteria without which legitimation
29 seems to remain rather weak (because largely idiosyncratic).¹¹⁷
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38 for European Private Law—Policy Choices and Codification Problems’, *Oxford J Legal Studies* (2008)
39 28 (4): 659-708 (previously published in German in 63 *JZ* (2008), 529-584).

40 ¹⁰⁸ See Jansen, *The authority of the academic ‘DCFR’*, op cit n 95.

41 ¹⁰⁹ Lord J. Mance, ‘The Common Frame of Reference’, 18 *ZEUP* (2010), 457-462.

42 ¹¹⁰ Eidenmüller et al, *Policy Choices and Codification Problems*, op cit n 107, 660.

43 ¹¹¹ O. Lando, ‘The Structure and the Legal Values of the Common Frame of Reference’, *ERCL* (2007),
44 245-256; R. Schulze & T. Wilhelmsson, ‘From the Draft Common frame of Reference towards
45 European Contract Law Rules’, 4 *ERCL* (2008), 154; H. Collins, ‘Review’, *Modern Law Review* (2008),
46 840-844; Hesselink, *The CFR as a source of European private law*, op cit n 23.

47 ¹¹² Action Plan, loc cit n 3, 62.

48 ¹¹³ The way forward, loc cit n 3, 10.

49 ¹¹⁴ See DCFR, Introduction, 8.

50 ¹¹⁵ See R. Sefton-Green, ‘The DCFR: A Technical or Political Toolbox?’ in A. Somma (ed), *The Politics of*
51 *the Draft Common Frame of Reference* Alphen a/d Rijn: Kluwer Law International, 2009), 39-50; H.
52 Schepel, ‘The European Brotherhood of Lawyers: the Reinvention of Legal Science in the Making of
53 European Private Law’, 32 *Law & Social Inquiry* (2007), 183-199

54 ¹¹⁶ On the historical law of reason, see F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter*
55 *besonderer Berücksichtigung der deutschen Entwicklung*, 2nd ed. [1967] (Göttingen: Vandenhoeck &
56 Ruprecht, 1996), 249.

57 ¹¹⁷ For an indication of what an analysis in terms of comprehensive theories of political philosophy
58 might look like, see below.
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Authorship

Another possible reason for courts to attribute authority to the instrument on European contract law could be its authorship. The DCFR was drafted by a 'network of excellence'.¹¹⁸ And the instrument is being drafted by an 'expert group' whose members were appointed, according to the European Commission, 'from specialists with outstanding competence in the area of civil law, and in particular contract law'.¹¹⁹ Could not then the instrument become a source of inspiration simply because of the reputation of its drafters? This seems very unlikely indeed. For, whatever the current nature and scientific status of legal scholarship the days of such a strongly scholastic attitude are long over.¹²⁰ Admittedly, the notions of *communis opinio doctorum* still plays a role in legal discourse in many countries, in Germany a *herrschende Meinung* is still distinguished from a *Minderheitsansicht*,¹²¹ while in France *la doctrine* is still regarded as a source of law,¹²² and some have attributed authority to the Unidroit Principles and the Principles of European Contract law, in part, because of the 'very high professional qualifications' of their authors.¹²³ However, the selection of by the Commission of its 'experts' has not been uncontroversial, to say the least. In Germany, a group of law professors challenged it in a letter to the editor in the *Frankfurter Allgemeine Zeitung*.¹²⁴ And in France the composition (through cooptation) of the Study Group on a European Civil Code, the main drafter of the DCFR, had already been under severe attack in France.¹²⁵ Therefore, it seems unlikely that any use made of the instrument on European contract law by judges as a toolbox can be legitimised by the purported reputation of its authors alone.

Good governance

Could a judges' toolbox function for the ECL-instrument be justified in terms of good governance? As said, the idea of a common frame of reference was launched by the European Commission in its 2003 Action Plan and was presented there as a tool for

¹¹⁸ Joint Network on European Private Law (CoPECL: Common Principles of European Contract Law), Network of Excellence under the 6th EU Framework Programme for Research and Technological Development, Priority 7 – FP6-2002-CITIZENS-3, Contract N° 513351.

¹¹⁹ Art. 4 para 2, Commission decision, loc cit n 6.

¹²⁰ For a different view, see G. De Geest, 'Hoe maken we van de rechtswetenschap een volwaardige wetenschap?', *Nederlands Juristenblad* 2004, 58.

¹²¹ According to current practice in the German commentaries, like *Münchener Kommentar* and *Palandt*.

¹²² C. Jamin & P. Jestaz, *La doctrine* (Paris: Dalloz, 2004).

¹²³ See Canaris, *Die Stellung der Principles*, op cit 107, 28.

¹²⁴ J. Basedow, H. Eidenmüller, C. Grigoleit, S. Grundmann, N. Jansen, E.-M. Kieninger, H.-P. Mansel, W.-H. Roth, G. Wagner & R. Zimmermann, 'Ein europäisches Vertragsrecht kommt - aber zu welchem Preis?', *Frankfurter Allgemeine Zeitung*, 4 July 2010.

¹²⁵ Y. Lequette, 'Quelques remarques à propos du projet de code civil européen de M. von Bar', *D.* 2002, 2202-2014, 2209: 'Quant au *choix des membres* de ces commissions. A ce que l'on sait, M. von Bar occupe le sommet de la pyramide et, sauf à respecter une certaine variété géographique, dispose d'une totale liberté pour choisir à sa seule convenance les membres de ce groupe. C'est là un pouvoir tellement exorbitant qu'il suscite immédiatement une autre question: d'où M. von Bar tient-il lui-même ses pouvoirs? Est-il l'oint du Seigneur? S'est-il auto-investi de la mission d'élaborer un code civil européen?' (emphasis in original)

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3 making European contract law more coherent. In that plan the CFR was linked up
4 explicitly to the Commission's more general policy towards improving European
5 governance and reforming the regulatory environment in the EU,¹²⁶ that had been
6 expressed in its 2001 White Paper on European Governance and its 2002 Better
7 Regulation Action Plan,¹²⁷ where one of the five stated principles of good
8 governance was coherence.¹²⁸ As we saw above, an instrument on European
9 contract law as a toolbox, not only for legislators but also for judges, can certainly
10 contribute to improving the coherence of European contract law.
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14 However, there is more to good governance than coherence. The other four
15 principles of good governance that were stated in the White Paper were: openness,
16 participation, accountability and effectiveness.¹²⁹ Especially, in relation to
17 participation in the making of the CFR and the forthcoming instrument doubts have
18 been raised.¹³⁰ It is true that the Commission is currently undertaking its second
19 broad consultation on European contract law in a decade and that, like the DCFR,
20 also the current drafts for the instrument are being submitted to stakeholders.¹³¹
21 However, the stakeholders have been selected by the Commission while the text
22 potentially affects all citizens.¹³² Moreover, the number of people that are having
23 actual influence on the text is rather restricted.¹³³ Suggestions for a more inclusive
24 process, like a convention or a Wiki-CFR, have not been followed.¹³⁴
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29 In the literature on European private law governance, much of the focus has been on
30 the market regulatory functions played by private law and private actors,¹³⁵
31 although there are also broader and more inclusive perspectives.¹³⁶ Could an ECL-
32 toolbox for judges be relevant for private regulation? Only remotely, it seems. In a
33 broad sense all contracts are examples of private regulation. Think only of the
34 famous Art. 1134 Para 1 of the French Civil Code according to which '[a]greements
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38 ¹²⁶ Action Plan, loc cit n 3, 72.

39 ¹²⁷ See European Governance, a White Paper, COM(2001) 428 final, 25.7.2001; Communication from
40 the Commission, Action plan "Simplifying and improving the regulatory environment", COM(2002)
41 278 final, 5.6.2002.

42 ¹²⁸ White Paper, loc cit n 126, 10.

43 ¹²⁹ See also the Communication from the Commission, European Governance: Better law making,
44 COM(2002), 275 final, 5.6.2002; 'promoting a culture of dialogue and participation' (p. 3). There is a
45 reference to promoting good governance and ensuring the participation of civil society in Article 15
46 TFEU, para 1.

47 ¹³⁰ Micklitz, *Review of academic approaches*, op cit n 96, draws an analogy to the so-called 'new
48 approach' to technical standards.

49 ¹³¹ See DG Justice, *Roadmap 2011*, August 2010, 4.

50 ¹³² See M.W. Hesselink, 'Who has a stake in European contract law?' 3 *ERCL* (2005) 295-296.

51 ¹³³ As Micklitz, *Review of academic approaches*, op cit n 96, 728, points out with regard to the
52 academic input into the DCFR, 'The network of excellence established by the European Commission
53 excluded all academics who are not directly involved in the discussion.'

54 ¹³⁴ Hesselink, *The CFR as a source of European private law*, op cit n 23, 960.

55 ¹³⁵ See eg F. Cafaggi & H. Muir-Watt (eds.), *Making European Private Law Governance Design*
56 (Cheltenham, UK: Edward Elgar, 2008); F. Cafaggi & H. Muir-Watt, *The Regulatory Function of*
57 *European Private Law* (eds.) (Cheltenham, UK: Edward Elgar, 2009).

58 ¹³⁶ See especially H. Collins, *Regulating Contracts* (Oxford: OUP, 1999).
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3 lawfully entered into take the place of the law for those who have made them.¹³⁷
4 However, as the same provision underlines, in principle, such private regulations
5 are only binding on the parties that made them. Indeed, it is a fundamental principle
6 of contract law that parties can only bind themselves (privity or relativity of
7 contract).¹³⁸ Moreover, even the strongest advocates of party autonomy
8 acknowledge today that contracts are not binding merely as a matter of natural law
9 but because private law enforces them.¹³⁹ So, how can private regulation ever
10 become legally binding on individuals beyond the simple binding force of a contract
11 between the parties? Well, to the extent that they are recognised by the law, ie
12 through the civil code or statute, or via judicial recognition.¹⁴⁰ Private regulation can
13 become legally relevant via the classical notion of custom or through open norms
14 and standards such as good faith, good custom and diligence. In the same way, an
15 optional instrument could also operate as an entrance door for private standards.
16 The DCFR, especially Part IV, on specific contracts (eg service contracts and
17 franchising), contains a great variety of potential openings, and also the non-
18 conformity concept in art. IV.A.-2:301 could be coloured by acknowledged business
19 standards. As to general contract law, the DCFR refers to usage in several provisions
20 including art. II.-1:104. Think also of the duty of good faith and fair dealing (III.-
21 1:103), the omnipresent standard of reasonableness and the notion of good
22 commercial practice.¹⁴¹ Similarly, in its role as a toolbox, be it for legislators or for
23 judges, the instrument could contribute more softly to further legitimation as well.
24 However, this is all about legitimation of private regulation through the ECL-
25 instrument. The question that really concerns us here is whether the idea of private
26 regulation could somehow contribute to legitimating the use of the ECL-instrument
27 as a toolbox for judges. That could the case if private regulation could be shown
28 somehow to be intrinsically good, quite apart from any further normative standard.
29 However, the legitimacy of private regulation rather seems to depend ultimately on
30 either (individual or collective) private autonomy or on the general legitimation of
31 private law that will be discussed in the next section.¹⁴²
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41 ¹³⁷ 'Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.' For a political
42 history of this provision, see C. Jamin, 'Une brève histoire politique des interprétations de l'article
43 1134 du code civil', 178 *Dalloz* (2002), 901-907.

44 ¹³⁸ H. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *Contract Law; Ius Commune*
45 *Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2010), 1171.

46 ¹³⁹ See eg W. Flume, *Allgemeiner Teil des Bürgerlichen Rechts; Vol. II. Das Rechtsgeschäft*, 4th ed.
47 (Berlin/Heidelberg/New York: Springer, 1992), 1.

48 ¹⁴⁰ This is acknowledged by F. Cafaggi, 'Private Regulation in European Private Law', in: A.S.
49 Hartkamp et al (eds), *Towards a European Civil Code*, 4th ed (Alphen a/d Rijn: Kluwer Law
50 International, 2010), 91-126, 96.

51 ¹⁴¹ See eg II.-9:405 (Meaning of "unfair" in contracts between businesses).

52 ¹⁴² Therefore, it seems doubtful that private regulation should be in need of any further legitimation,
53 eg via public accountability. A given private standard is either not binding on a private party that did
54 not agree to it, as a result of the privity principle (together with its corollary, the autonomy
55 principle), or it is binding, via some broad standard of private law, such as reasonableness, but then
56 the legitimation is the usual legitimation of (private) law. For an exploration of the public
57 accountability path, see D. Curtin & L. Senden, 'Public Accountability of Transnational Private
58 Regulation: Chimera or Reality?' (forthcoming, *Journal of Law and Society*).
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Political philosophy

A final possibility would be purely normative legitimation. Sometimes theories of contemporary political philosophy (or more classical ones)¹⁴³ are explicitly invoked in order to justify a certain normative position in relation to European contract law.¹⁴⁴ More often, however, without any explicit claims being made by anyone, there often are in fact structural similarities between discourses. For example, much of the law & economics contribution to the European private law debate is implicitly utilitarian, albeit sometimes combined - not wholly unproblematically - with some libertarian elements. Leading contemporary theories of social justice could be 'applied', as it were, to the grand questions of European contract law. This could lead to a rather comprehensive matrix of the main positions concerning the principal normative questions of European contract law. It is submitted that a political-philosophical analysis of European contract law along these lines would provide a fuller picture than one-dimensional schemes of left-versus-right,¹⁴⁵ or diachronic accounts featuring one leading idea at a time,¹⁴⁶ or spacetime analyses in terms of national political traditions.¹⁴⁷ What would contemporary theories of social justice have to say on the legitimacy of an instrument on European contract law as a toolbox for judges? What follows here are a few first impressions.¹⁴⁸

For a utilitarian, what matters is social utility (or social welfare), often reduced in the law and economics literature to 'economic efficiency' and economic growth. On this view, the protection of rights, distributive justice and other values are not of direct importance; they should count at most indirectly, i.e. to the extent that individuals value them (which is an empirical matter) and maybe as proxies for variables that (so far) escape reliable measurement.¹⁴⁹ The 'economic argument' is

¹⁴³ Especially Kant is often invoked to explain the nature of contractual obligation, notably by German scholars. See recently eg H. Unberath, *Die Vertragsverletzung* (Tübingen: Mohr Siebeck, 2007) and J. Basedow, 'Freedom of Contract in the European Union', *ERPL* 16 (2008), 901-923.

¹⁴⁴ For example, S. Grundmann, 'Consumer Law, Commercial Law, Private Law: How can the Sales Directive and the Sales Convention be so Similar?', *EBLR* (2003), 237-257 and J.M. Smits, 'European Private Law: a Plea for a Spontaneous Legal Order', in: Deirdre M. Curtin, Jan M. Smits, André Klip and Joseph McCahery, *European Integration and Law* (Antwerp and Oxford: Intersentia, 2006), 85, for F. von Hayek's libertarianism. Or S. Deakin, 'Capacitas: Contract Law, Capabilities and the Legal Foundations of the Market', in: Simon Deakin & Alain Supiot (eds.), *Capacitas: Contract Law, Capabilities and the Legal Foundations of the Market* (Oxford: Hart Publishing, 2009) pp. 1-30 for Amartya Sen's capabilities approach. Or R. Sefton-Green, 'Social Justice and European Identity in European Contract Law', 2 *ERCL* (2006), 275-286, 278, for Nancy Fraser's critical theory.

¹⁴⁵ See D. Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law', 10 *ERPL* (2002), 7-28. For European contract law see M.W. Hesselink, 'The Politics of a European Civil Code', 10 *European Law Journal* (2004), 675-697. For European sales law, see B. van Zelst, *The Politics of European Sales Law* (Alphen a/d Rijn: Kluwer Law International, 2008).

¹⁴⁶ D. Kennedy, 'Three Globalizations of Legal Thought: 1850-2000', in: D. Trubek & A. Santos (eds) *The New Law and Economic Development. A Critical Appraisal* (Cambridge: CUP, 2006), 19-73.

¹⁴⁷ See eg Micklitz, *Failure or Ideological Preconceptions*, op cit n 17.

¹⁴⁸ In the selection of contemporary theories I essentially follow W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: OUP, 2002).

¹⁴⁹ For a full statement of this idea see L. Kaplow & S. Shavell, *Fairness versus Welfare* (Cambridge, Massachusetts: Harvard University Press, 2002).

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3 quite prominently present in the European private law debate. It has been directed
4 against the idea of a European civil code, on account of the claims (borrowed from
5 the economics of federalism) that centralised and uniform law is bad, given (largely
6 assumed) diverse preferences along Member States lines, and that competition
7 between legal systems is more efficient.¹⁵⁰ The idea of an optional code has been
8 sustained on the 'economic' grounds that more choice and competition are good),¹⁵¹
9 although others have pointed out that competition is distorted by the endorsement
10 of and subsidy to one of the models by the European legislator.¹⁵² Finally, the
11 content of the DCFR has been scrutinised in welfare economic terms.¹⁵³ This has led
12 to severe criticism: many of the rules and doctrines have been rejected as
13 'inefficient'.¹⁵⁴ What are the implications for the legitimacy of the instrument as a
14 toolbox for judges? Utilitarians would probably not mind the non-binding nature of
15 it. On the other hand, they would probably be sceptical about its rather shadowy
16 pedigree: the genesis of the instrument may give more an impression of privilege
17 than of utility. More specifically, they would probably favour the use of the
18 instrument as a toolbox to the extent (as exactly as possible) that the rules
19 contained in it are efficient. This probably means that courts ideally would have to
20 examine for each specific rule or doctrine whether it leads to efficient outcomes.
21 And absent empirical data, they probably should take the available economic
22 analyses in welfare economic terms into account.
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29 What would be the view of a liberal egalitarian? For a Rawlsian the answer would
30 crucially depend on whether contract law should be regarded as part of what Rawls
31 called the 'basic structure' of society which determines the distribution of the
32 'primary goods' that every one wishes to have, whatever their particular life plan or
33 conception of the good.¹⁵⁵ For, only if contract law is part of the basic structure are
34 Rawls' two principles of justice (i.e. the 'equal basic liberties' and the 'difference' (or
35 maximin) principle) applicable to contract law. Whether contract law is one of these
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39 ¹⁵⁰ See eg R. Van den Bergh, 'Forced Harmonization of Contract law in Europe: Not to be continued',
40 in: S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The
41 Hague: Kluwer Law International, 2002), 249-268; A. Ogus, 'Competition between National Legal
42 Systems: A Contribution of Economic Analysis to Comparative Law', 48 *International and*
43 *Comparative Law Quarterly* (1999), 405-418.

44 ¹⁵¹ See J.M. Smits, 'European Private Law and Democracy: a Misunderstood Relationship' in: M. Faure
45 & F. Stephen (eds.), *Essays in the Law and Economics of Regulation in Honour of Anthony Ogus*,
46 (Antwerp-Oxford: Intersentia, 2008), pp. 49-59.

47 ¹⁵² S. Grundmann, 'The role of competition in the European codification process', in: H. -W. Micklitz &
48 F. Cafaggi (eds.), *European private law after the Common Frame of Reference* (Cheltenham, UK:
49 Edward Elgar, 2010), 36-55.

50 ¹⁵³ See, in particular, G. Wagner (ed), *The Common Frame of Reference: A View from Law & Economics*
51 (Munich: Sellier, 2009); P. Larouche & F. Chirico (eds), *Economic Analysis of the DCFR* (Munich:
52 Sellier, 2010).

53 ¹⁵⁴ Ibidem.

54 ¹⁵⁵ See J. Rawls, *A Theory of Justice*, revised edition (Belknap Press, Cambridge, Massachusetts, 1999
55 [1971]). A. Sen, *The idea of justice* (London, Penguin, 2009), regards his own theory as Rawlsian even
56 though he rejects the concept of a basic structure. Other prominent liberals, like R. Dworkin,
57 *Sovereign Virtue; The Theory and Practice of Equality* (Cambridge Massachusetts: Belknap Press
58 2000), and I. Berlin, *Liberty* (Oxford: OUP, 2002) have never included such a concept in their theories.
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basic institutions that provide the background justice against which individuals are free to make their own choices, is controversial. Rawls himself probably did not regard contract law as part of the basic structure,¹⁵⁶ but others have argued that the two principles of justice should apply to contract law because of the important distributive role that contract law plays.¹⁵⁷ However, even if contract law, and thus probably an optional instrument,¹⁵⁸ were part of the basic structure, what about the instrument on European contract law as a toolbox for judges? It seems rather far fetched to include that in the basic structure as well. The concept of a basic structure would risk to become meaningless. Thus, the conclusion seems to be that from a Rawlsian liberal perspective it is indifferent whether or not an instrument on European contract law will become a toolbox for judges and, if so, what its content should be - with or without the toolbox (no matter what its content) a society would be equally just. Moreover, on trans- and post-national justice Rawls' theory is notoriously inadequate.¹⁵⁹ Therefore, Rawls' theory of justice, seems to be blank on the question whether contract law (including a toolbox for judges) should be located on the European or national level of governance.

Like liberals, also libertarians come in different varieties. But what Nozick, Hayek, and Milton Friedman have in common is that they are all advocates of free markets and opponents of redistributive policies.¹⁶⁰ Therefore, a libertarian probably also would appreciate the non-binding nature of the toolbox idea. However, if the content of the instrument is going to be broadly similar to the DCFR he or she would not be too pleased with its content. In other words, she would find only few useful tools in it. The reason is, of course, that from their perspective the text gives insufficient prominence to formal party autonomy and to freedom of contract. It would probably be rejected as being socialist. Indeed, the DCFR has been criticised as being too much on the left.¹⁶¹ However, unlike utilitarians a libertarian would not be per se sceptical about the European level as the right regulatory level for locating contract law: on this question Nozickian libertarians probably would be neutral whereas a Hayekian libertarian (because of its anti-nationalism) might even be

¹⁵⁶ See eg J. Rawls, *Political Liberalism*, expanded edition [first edition 1993] (New York: Columbia University Press 2005), 282-283.

¹⁵⁷ See A.T. Kronman, 'Contract Law and Distributive Justice', 89 *Yale Law Journal* (1980) 472; K.A. Kordana & D.H. Tabachnick, 'Rawls and Contract Law', 73 *George Washington Law Review* (2005), pp. 598-632.

¹⁵⁸ Although there might be further issues relating to the optional nature of the instrument. There is general agreement that even if contract law is part of the basic structure, contracts are not. It might be argued that, in this respect, an optional instrument is somewhere between a contract and contract law.

¹⁵⁹ See M.C. Nussbaum, *Frontiers of Justice* (Harvard: Belknap, 2006), chapters 4 and 5.

¹⁶⁰ F.A. Hayek, *Law, Legislation and Liberty; A new statement of the liberal principles of justice and political economy* (London and New York: Routledge, 2003); R. Nozick, *Anarchy, State and Utopia*, [first edition 1974] (Oxford: Blackwell Publishing 2006); M. Friedman & R. Friedman, *Free to choose: a personal statement* (New York: Harcourt: 1990 [1980]).

¹⁶¹ Eidenmüller et al, *Policy Choices and Codification Problems*, op cit n 107.

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3 favourable.¹⁶² Therefore, the European character of the toolbox would probably not
4 disturb a libertarian.
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7 Also communitarianism is nothing like a single theory or school of thought.
8 However, what such different philosophers as Sandel, MacIntyre and Walzer have in
9 common is an emphasis on community, traditions and the local, as opposed to the
10 individual, rational and universal.¹⁶³ They would probably reject the toolbox idea to
11 the extent that it is based on a rational design by experts for universal application
12 across Europe which is meant to overcome the variety of legal traditions. At the
13 most they would accept a much more gradual and 'natural' convergence: we should
14 wait until a truly European tradition has developed, bottom up instead of any
15 imposition top-down (even if only in the soft fashion of a toolbox for judges).
16 Clearly, such ideas match very well with a number of evolutionary and organicist
17 approaches to European private law, such as the neopandectism of Zimmermann
18 (who explicitly invokes Savigny),¹⁶⁴ the emphasis on the historical development of
19 tradition and authority by Nils Jansen,¹⁶⁵ the legal culturalism of Legrand¹⁶⁶ and,
20 although less radical, Sefton-Green,¹⁶⁷ but also Teubner's theory of law as an
21 autopoietic system.¹⁶⁸ However, to the extent that the instrument can be
22 demonstrated to be, not a rationally designed instrument, but, on the contrary,
23 merely a codification of an existing tradition, that would be more appealing in the
24 eyes of a communitarian. This tradition could be either the by now almost a Century
25 old international tradition, ie merely the next step in a historical line running from
26 Rabel, via the Hague conventions LUF and LUVI, CISG, Unidroit Principles, PECL and
27 the DCFR to the instrument on European contract law, where the same text has
28 gradually developed further, from one version to the next. Or it could be a truly
29 European national tradition to the extent that the PECL, DCFR and the instrument
30 can rightfully be claimed to represent the common core of contract law in Europe.¹⁶⁹
31 Having said that, the whole terminology of tools and problem fixing would probably
32 just sound too pragmatic to anyone holding a more evolutionary understanding of
33 the law.
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43 ¹⁶² See M.W. Hesselink, 'A spontaneous order for Europe? Why Hayek's libertarianism is not the right
44 way forward for European private law' in: H.-W. Micklitz & F. Cafaggi (eds.), *European private law*
45 *after the Common Frame of Reference* (Cheltenham, UK: Edward Elgar, 2010), 123-172.

46 ¹⁶³ M.J. Sandel, *Liberalism and the Limits of Justice*, 2nd ed (Cambridge: CUP, 1998); M. Walzer, *Spheres*
47 *of Justice; A Defense of Pluralism and Equality* (Basic Books, 1983); A. MacIntyre, *After Virtue*, 3rd ed
48 (London: Duckworth, 2007).

49 ¹⁶⁴ R. Zimmermann, 'Roman Law and the Harmonization of Private Law in Europe': in A.S. Hartkamp
50 et al (eds), *Towards a European Civil Code*, 4th ed, (Alphen a/d Rijn: Kluwer Law International, 2010),
51 27-53.

52 ¹⁶⁵ Most recently, N. Jansen, *The Making of Legal Authority; Non-legislative Codifications in Historical*
53 *and Comparative Perspective* (Oxford: OUP, 2010).

54 ¹⁶⁶ P. Legrand, 'Against a European Civil Code', 60 *MLR* (1997), 44-62.

55 ¹⁶⁷ R. Sefton-Green, 'Cultural diversity and the idea of a European civil code', in M.W. Hesselink (ed),
56 *The Politics of A European Civil Code* (The Hague: Kluwer Law International, 2006).

57 ¹⁶⁸ G. Teubner, *Recht als autopoietisches System* (Frankfurt am Main: Suhrkamp, 1989).

58 ¹⁶⁹ On this problematic nature of this claim see above @.
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As a final prominent group of theories in contemporary political philosophy we can cite deliberative democracy and citizenship theories. These theories have in common that they are more process than outcome oriented. Unlike utilitarianism communitarianism and liberal-egalitarianism, they focus on civic virtues and deliberation rather than on perfect or minimum outcomes. They are a response to 'passive' or 'private' citizenship. They emphasise that individuals and communities do not merely have rights, but also duties. There are different strands of citizenship theory. Some focus on the civic virtues of individuals. They aim at cultivating seedbeds of civic virtue. This approach is often referred to as 'civic republicanism'. Others focus more on a virtuous collective process. Advocates of deliberative democracy argue in favour of a shift from a vote-centric conception of democracy to a talk-centric conception of participation. Habermas underlines that there is no reason why there should be any difference, in this respect, between private law and public law: also in relation to private law citizens should be able to regard themselves not only as the addressees but also as the authors of the law.¹⁷⁰ Although any instrument on European contract (be it as an optional instrument or a legislator's toolbox) will be the outcome of a public consultation it is doubtful whether that this consultation, or the stakeholder involvement during the drafting, will meet the requirements of an inclusive and deliberative process.¹⁷¹ In earlier stages already the CFR process has been denounced as lacking legitimacy exactly in these terms,¹⁷² whereas in the current stage there simply is not enough time for a meaningful public debate. And in any case, whatever the outcome, the consultation will never have included the question whether the instrument could also become a toolbox for judges. Therefore, there is little in terms of citizenship and deliberative democracy that a toolbox for judges could derive political legitimacy from. That might be different if, in the longer run, the instrument on European contract law as a source of inspiration were to become the object, maybe on a case to case basis, of a much broader and inclusive societal debate.

Conclusion

The forthcoming instrument on European contract law, be it in the shape of an optional code for cross-border contracts or as an official toolbox for the European legislator, is likely to have a spill-over effect on adjudication. Judges will have no great difficulty in finding model rules and definitions that might come in handy when dealing with gaps and ambiguities in European private law. However, the question is whether such a role as a toolbox for judges would be legitimate. I have discussed three types of possible legitimisation strategies: the new European methods (sincere cooperation and Europe-friendly interpretation, soft harmonious interpretation and general principles of EU law), traditional methods of legal

¹⁷⁰ J. Habermas, *Faktizität und Geltung; Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 5th ed. (Frankfurt: Suhrkamp, 1997), 52.

¹⁷¹ On some of the details see above.

¹⁷² Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto', 16 *European Law Journal* (2004), 653-674.

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3 interpretation (grammatical, historical, systematic, teleological and comparative),
4 and merely political legitimation (in terms of political support, substantive quality,
5 authorship, good governance, or political philosophy). It will often depend on the
6 circumstances of the case at hand and the characteristics of the particular model
7 rule or definition that is being borrowed what mode of legitimation will prove to be
8 more convincing. However, generally speaking legitimation in terms of the general
9 principles of civil law that the CJEU has recently been developing seems a
10 particularly promising strategy. On the other hand, it seems unlikely that European
11 courts could even come under a duty, following from the principle of sincere
12 cooperation, to use the instrument as a toolbox.
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